Toledo, Carty Finkbeiner, said that the city was "prepared to do whatever it can to keep Jeep in Toledo." He said that would include money and a package of incentives including tax breaks. *Id.*

By August of 1997, Chrysler had become the latest company to negotiate extensive tax breaks and other government incentives, as stated in a *New York Times* article of August 12 1997. "Never mind that the new factory will have 600 fewer jobs than the one it replaces, that unemployment rates are at record lows and that Chrysler planned to stay within 15 miles of Toledo – possibly somewhere in Michigan – even if it had abandoned its downtown site" reported the *Times*. Robyn Meredith, "Chrysler Wins Incentives From Toledo," *N.Y. Times*, August 12, 1997, Sect. D. "So Toledo, following a practice that is common across the country—from New York to Tuscaloosa, Ala.,--paid to keep the company from moving out[]" continues the story. *Id.*

Four months later, the *Akron Beacon Journal* reported on December 7, 1998, referencing Toledo and the state's efforts relating to DaimlerChrysler, "The city has uprooted homeowners, relocated businesses and built roads to help DaimlerChrysler AG expand and modernize its two plants. But all the efforts have put the city in debt, *The Blade* reported yesterday. City and state government expenses originally estimated at $30 million have now soared to a projected $76 million. Interest payments on money borrowed for the project could cost taxpayers another $25 million over 20 years. . . . The city's problems began in July 1997 when city officials and Chrysler executives negotiated a $278 million incentive package to induce the automaker to expand the Jeep plant." Associated Press, "Toledo Speeds Into Debt with Plans to Keep Jeep," *Akron Beacon J.*, December 7, 1998, Sect.: Ohio.

In order to facilitate the Agreement with DaimlerChrysler, Toledo officials created the "Stickney Urban Renewal Plan

District" approved by the City on July 31, 1998. But prior to that time, money was appropriated to begin contemporaneously to negotiate and acquire some of the 115 structures in the target area. (Eminent domain was also used as noted in the those portions of the Complaint relating to Kim's Auto) Acquisition of some 200 acres was a large part of the City's anticipated responsibilities in the deal to keep Jeep in Toledo. As a consequence of these actions, it is apparent that the role of the "Stickney Urban Renewal Plan" was merely to legitimate and ratify the foregone conclusion that immediate eradication of nearly all 115 structures in the target District was required to make way for "development," i.e., conveyance for free to DaimlerChrysler to build the new plant. (Brief to Ohio COA in regard to the Kim's Auto taking.)

A key component of the ITC at issue is the additional 6% credit that is available for areas that are designated as "distressed" by the Ohio Department of Development at the request of a local government. The Agreement entered into by the City of Toledo and DaimlerChrysler dated November 12, 1998 states: "Chrysler shall receive an annual 13.5% corporate franchise tax credit for all eligible investments. . .." indicating that the designation authorized by the ITC statute had been approved.

The purpose of this historical recitation is to put into perspective what exactly the ITC statute's role was in relation to the DaimlerChrysler Agreement with the State of Ohio and the City of Toledo. It was not as Petitioners suggest, merely to facilitate an intrastate business decision but instead was a calculated and negotiated special deal of which the ITC was a major component used to influence the decision of DaimlerChrysler as to where it would locate its new plant – Ohio or Michigan. Of course, the ITC and the bonus 6% credit that went with it based on the distressed designation were only part of the overall incentives package that included property tax abatements and free land delivered from the City, including land taken by eminent domain. See *Kelo v. City of New*

London, 126 S. Ct. 326 (2005). Thus, the argument that the Ohio ITC as applied in this case is simply a neutral intrastate economic development tool does not reflect an accurate picture of what actual role the ITC played in this case.

C. Petitioners' And Their Amici's Argument That The ITC Does Not Result In "Economic Protectionism" Fails To Accurately Reflect The National Impact Of The Incentives War.

Petitioners and their amici supporters argue further that the ITC does not result in "economic protectionism" or "economic isolation." Nor does it, they argue, negatively impact other states or interstate commerce. Such rationalization fails to see the forest for the trees. As an editorial in the *Akron Beacon Journal* on December 5, 1996, noted in discussing the property tax abatement, which was a part of the DaimlerChrysler agreement: "Rare is the community that does not grant abatements. In the competition for jobs and industry, abatement has become a necessary, if often maddening, fact of public life. . . . Still, as inescapable as tax abatement may be, it remains a questionable part of the tax system. Beyond the difficulties schools may face, the scheme is unfair to the many companies that do not seek tax breaks, that have resided for years in communities and paid their full share of taxes." "Breaking for Chrysler: The Automaker's Request for an Expanded Tax Break Offers a Glimpse at the State's Outmoded Tax System," *Akron Beacon J.,* December 5, 1996, Editorial. In an editorial in the *Charleston* [W.Va.] *Daily Mail* dated October 28, 2005, the paper said: "The state's use of the tax code in an attempt to pick and choose winners and losers in the economy goes against the fundamental principles of the free market. It is an invitation for catastrophe...The [tax credits] did not work as intended." *Des Moines Register* columnist Richard Doak summed up the issue on October 17, 2005:

> "...a major reason for calling a convention and drafting a new Constitution was to create a single national economy. America's unprecedented prosperity in succeeding decades was built on freedom, an effective central government and having a single marketplace that eventually spanned an entire continent. The commerce clause established the vast free market that is at the root of America's economic success.
> The Constitution was adopted in large part to stop a trade war among the states. Now there is another economic war among the states, this one fought with business incentives instead of tariffs.
> This one should be stopped, too.

Richard Doak, "Court Can Stop Economic War Between States," *Des Moines Register*, October 17, 2005.

The opinions of thoughtful commentators, business people, and elected officials go on and on detailing the national game of targeted incentives or subsidies such as those DaimlerChrysler received. Each state is looking out for its own self interest as companies and jobs are lured from other states or enticed to not relocate or expand to a different state. It is "economic protectionism and isolation," 21st Century style. The ITC, along with the accompanying subsidies, are all part of the tools used to thwart the free market system that the founding fathers sought to create. Petitioners argument that the statute at issue and its application to the facts of this case do not fall within the purview of the Dormant or Negative Commerce Clause must fail and those having cloaked themselves in the blanket of "pro business" should heed the words of Grant Gulibon writing for the *CNHI News Service* on December 1, 2005:

> "In the end, we have to ask ourselves whether a state can truly be considered 'pro-business' when it relies on an economic development strategy that forces some businesses to subsidize their competitors, forces general

> taxpayers to add to the profits of private businesses, and promotes policies that cause an inefficient allocation of scarce resources. A state with a truly 'pro-business' climate would recognize the private sector as the primary force driving economic development decision-making, with state government performing the vital but limited roles of guarantor of individual freedom, enforcer of contracts, protector of private property and provider of legitimate infrastructure that can be used by all businesses."

Grant Gulibon, "Government's Role in 'Economic Development,'" CNHI News Service, December 1, 2005.

This Court, upon reaching the merits, must evaluate whether the reasoning employed by the Court of Appeals and the result that followed – reversing the trial court's dismissal of Plaintiffs' case pursuant to Rule 12(b)(6) – was correct. Respondents have advanced a compelling argument that the ITC violates the Commerce Clause because of its discriminatory impact on interstate commerce. That argument alone suffices to justify the decision of the Court of Appeals. Amicus herein, respectfully submits, that in addition to that theory, the augmented argument and theory advanced in this brief should likewise result in affirmance of the Court of Appeals. The ITC, in conjunction with other "incentives," including the additional 6% ITC on investment in a "distressed" area, interferes with interstate commerce and the free market decision making of private business by granting targeted subsidies to individual businesses to impact which state those businesses choose to locate and/or expand in. It is the ultimate in economic protectionism.

An appellate court's standard of review in determining the correctness of a trial court's decision to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is *de novo. Kugler v. Helfant*, 421 U.S. 117, 125-126, n. 5, 95

(1975). The court must presume that all factual allegations in the complaint are true, and draw all reasonable inferences in favor of the non-moving party. *Id.*.

The allegations in Plaintiffs' complaint are adequate to allege facts that would support a determination that a violation of Commerce Clause had been sufficiently pleaded. Plaintiffs allege an Agreement among the Defendants in this case that resulted in a package of incentives or subsidies totaling $281 million and that these incentives were the requisite inducements to result in DaimlerChrysler locating its facilities in Toledo, Ohio as opposed to across the state line in Michigan. Further, the pleadings allege that the decision deprived Michigan of economic opportunities in the form of jobs and/or certain tax revenues that would have benefited certain local governments and the state of Michigan. Taken in its totality, the allegations at that preliminary stage of the litigation more than make out a compelling case for the kind of economic protectionism that is targeted by the Commerce Clause jurisprudence. What is alleged is not the legitimate competition for interstate business that has been sanctioned by the courts and is an inherent part of a free market economy. Rather the circumstances at issue stand as a modern-day version of a trade war, with ever-escalating "targeted" incentives, negotiated in the private offices of big business and government, and which are made available only to the biggest and the wealthiest enterprises that can stake a seat at the "incentives game" table. Petitioners attempt to gloss over both the realities of what happened in Toledo and its impact on its neighbors in Michigan—the offer of a multimillion dollar package of subsidies in the form of Investment Tax Credits, property tax abatements and free land for DaimlerChrysler to keep it from moving to Michigan, simply should not be sanctioned as conduct acceptable under the Commerce Clause of the United States Constitution.

CONCLUSION

Amicus respectfully urges that the decision of the Sixth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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Nos. 04-1704 and 04-1724

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of petitioners in the above-captioned matter.[1]

The Tax Foundation is a non-profit research organization formed in 1937 to educate taxpayers about sound tax policy. In this regard, the Tax Foundation disseminates information on taxes and promotes tax systems that are simple, fair, and favor economic growth. The Tax Foundation works to further this mission by educating the legal community on economic issues relating to tax law, educating lawmakers and the public on tax law issues in an understandable and relevant manner, and advocating that judicial decisions on tax law promote economic growth and tax competition.

SUMMARY OF ARGUMENT

As a threshold matter, it is critical to examine whether any respondent has standing to bring this suit. Each respondent lacks Article III standing, as any alleged injury is general, speculative, and attenuated. Further, a favorable decision would be unlikely to provide relief. Respondents in this case seek to change what they consider bad tax policy, not to address individual injuries. Such a grievance should be addressed to the legislature.

On the merits, respondents seek to transform this Court's past discussion of "tax neutrality" into a mandate for tax conformity. Disregarding this Court's clear recognition of the importance of permitting States to design tax systems that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of petitioners and respondents have been obtained and filed with the Clerk of the Court.

foster a competitive business climate, respondents would have the Commerce Clause interpreted to preclude any tax measure that might affect capital investment decision-making.

Clarification is needed as to which types of competitive tax advantages States may enact consistent with the Commerce Clause. Further, this Court should take this opportunity to explain its statements about tax neutrality in previous decisions, which respondents have misinterpreted in pressing this lawsuit, and which have left lower courts, commentators, and economists struggling to articulate its import for the scope of the dormant Commerce Clause. A clarification that the Commerce Clause requires competitive neutrality, not tax or economic neutrality, would lift uncertainty surrounding programs that encourage investment. The Commerce Clause prohibits tariff-like coercion and punishment of out-of-state activity, not every law that affects economic decision-making.

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT PROVISION.

The respondents, plaintiffs below, are merely concerned citizens. They believe that tax credits like Ohio's are bad tax policy. As a matter of tax policy, Amicus agrees with the respondents. None of the respondents, however, were directly injured by this credit and none would directly benefit from any judicial ruling in this matter. Their grievances are with the State's policy decisions and should be directed to the legislatures, not to the courts.

Minimum standing requirements are imposed by the Constitution and additional standing requirements have been

adopted for prudential reasons to prevent the politically disappointed from bringing legislative questions into a judicial forum. The law of "standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Respondents lack standing under both standards.

A. Respondents lack Article III standing.

According to their own complaint, the respondents are individual residents of Ohio, one not-for-profit Ohio corporation, two for-profit Ohio corporations, and individual residents of Michigan. Compl. ¶¶2–6. At least seventeen of the nineteen respondents were therefore not subject to Ohio's franchise tax at all. None of the respondents actually allege that they are subject to Ohio's franchise tax, or have been required to pay a tax or incur any other particular liability as a result of the challenged tax credit. *Cf., e.g., General Motors Corporation v. Tracy,* 519 U.S. 278, 286–87 (1997) (stating that taxpayer had standing to challenge a tax that it, itself, had paid).

The respondents do not claim that the challenged credit directly discriminated against them. None claim, for example, to be Ohio businesses that chose to invest outside the State instead of inside the State. *See Allen v. Wright,* 468 U.S. 737, 755 (1984) (ruling that only those who are personally discriminated against have standing to challenge the discrimination). None claim that Ohio required them to pay a tax imposed only on, or more heavily on, non-residents. *Cf., e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (holding that taxpayer had standing to challenge a tax that discriminated against imported products that directly affected its business). None even claim to be competitors with anyone who benefits from the credit. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321, n.3

(1977) (holding that out-of-state stock exchanges had standing to challenge discriminatory tax scheme that diverted transactions to in-state exchange).

Accordingly, none of the respondents are the "object of the action (or forgone action) at issue." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

1. Ohio respondents' interests as citizens and taxpayers do not give them standing.

None of the Ohio respondents meet the "irreducible constitutional minimum" of Article III standing: concrete and particularized "injury in fact," caused by the conduct complained of, and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

The Ohio respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, and that the credit "shifts to the Ohio [respondents] a disproportionate burden of supporting these government functions," are insufficient. Compl. ¶¶22, 40, 42. While tax credits do generally narrow the tax base, the injuries alleged by respondents are neither concrete nor particularized. A citizen's and taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quotations omitted). Standing is not established by a state taxpayer's showing that "he suffers in some indefinite way in common with people generally." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952) (quotations omitted).

Moreover, the causal connection between the tax credit offered to businesses that make large investments in Ohio and either lower tax revenues for Ohio or higher tax impositions on the Ohio respondents is, at best, tenuous. Respondents are only speculating that Ohio's tax revenues will decline as a result of this credit. The credit may, in fact, have the opposite effect. For example, DaimlerChrysler's investment in Ohio may well increase the State's revenues. DaimlerChrysler is likely buying supplies and contracting with service providers in Ohio. It is employing individual taxpayers in Ohio. The state tax revenues attributable to these vendors and employees, and to DaimlerChrysler itself, might actually increase as a result of the credit.

The Ohio respondents offer nothing to demonstrate that the credit will diminish overall state tax revenues. Even if respondents had a cognizable interest in reduced state revenues, which they do not, their claim that this has or will occur is entirely speculative. In addition, the alleged causal link is too attenuated. Whether Ohio's revenues increase as a result of the credit hinges on "unfettered choices made by independent actors" — investment, purchasing, and employment decisions made by various persons. *ASARCO*, 490 U.S. at 615. None are responsible for enacting the tax credit or capable of rescinding it.

Finally, the requirement that a favorable decision is likely to redress respondents' alleged injuries is not met. A favorable decision might just as likely exacerbate the alleged injuries as redress them. For example, if this Court were to uphold the Sixth Circuit and determine that the tax credit is unconstitutionally discriminatory in violation of the Commerce Clause, Ohio could fully redress such a constitutional violation by extending the credits to additional businesses. *See McKesson Corp. v. Division of Alcoholic*

Beverages, 496 U.S. 18, 50 (1990). By respondents' reasoning, that would further reduce the State's tax revenues.

Thus, the Ohio respondents have no cognizable interest in the injury they allege and there is no basis to conclude that the injury does or will even exist. Even if it did exist, the connection to the challenged provision is highly attenuated. And there is no basis to conclude that a favorable decision is likely to redress such injuries if they do exist. Each conclusion independently precludes respondents from maintaining this suit.

2. Michigan respondents do not have standing.

The Michigan respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, that this shifts a disproportionate tax burden to them, and that they have been deprived of employment opportunities, is similarly insufficient. Compl. ¶ 42. The tax revenue allegations, like the parallel allegations of the Ohio respondents, is not cognizable because it is remote, indeterminable, and lacks certainty. *ASARCO*, 490 U.S. at 613. In addition, the causal connection between any of their alleged injuries and the tax credit, and the likelihood of a favorable decision redressing such injuries, is even more speculative with respect to the Michigan respondents than the Ohio respondents.

Michigan respondents' allegations that they have standing are based on two conclusions. First, DaimlerChrysler would not have chosen to locate its plant in Ohio, absent the tax credit. Second, if DaimlerChrysler had ruled out Ohio, it would necessarily have built the plant in Michigan instead. Both are entirely speculative. With respect to the first, there is no basis to conclude that DaimlerChrysler did not base its location decision on a variety of considerations in addition to the tax credit. Taxes are